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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DONALD SHEPARD,

Petitioner,

v.

JOANN CAVALIERI, as plenary guardian of the Estate of STEVEN CAVALIERI, a disabled person,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Fourteenth Amendment imposes an ongoing duty upon a police officer, who has surrendered custody of a suspect to jail officials in a different police agency, to warn such officials when the officer subsequently hears allegations by lay persons that the suspect may be suicidal?

II. If such a duty exists, whether that duty was clearly established in the law in June 1998.

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OPINIONS BELOW

The opinion of the United States Court of Appeals (App. 1a) is reported at 321 F.3d 616. Its denial of the petition for rehearing is reproduced in the appendix (App. 55a). The decision and judgment of the district court are unreported and are reproduced in the appendix (App. 22a).

JURISDICTION

The court of appeals entered its judgment on February 24, 2003 (App. 1a). The timely-filed petition for rehearing with suggestions for rehearing *en banc* was denied on March 20, 2003 (App. 55a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution is identified as the source of the right claimed and the cause is brought under 42 U.S.C. § 1983.

STATEMENT OF THE CASE

Issues presented to the trial and appellate courts.

This case was brought under 42 U.S.C. § 1983 and related state law claims. Plaintiff is the mother of Steven Cavalieri, who is in a persistent vegetative state since his attempted suicide in the Champaign County, Illinois, jail on June 4, 1998. Plaintiff sued the County sheriff, who has exclusive authority over the conditions of confinement of the inmates of the county jail (*See Moy v. County of Cook*, 159 Ill. 2d 519,

640 N.E.2d 926 (1994)) and several correctional officers. The County defendants settled and were dismissed. (Order of the district court on summary judgment, App. 53a) The plaintiff also sued the City of Champaign and fourteen of its police officers who were involved in the arrest of Steven Cavalieri and the investigation of the crimes he allegedly committed. All of the City defendants were granted summary judgment except Detective Donald Shepard, whose claim of qualified immunity was denied. Shepard and the City, on a *respondeat superior* basis, were also denied summary judgment on one of the related state law claims. That claim is still before the district court. (Order of the district court on summary judgment, App. 53a-54a.)

The key issue is whether Shepard owed a duty to warn the Champaign County jail authorities of the information that Shepard learned after custody of Cavalieri had been transferred from the City police to the County jail, about Cavalieri's potential suicidal state. Shepard argued that the Fourteenth Amendment duty to provide necessary medical and mental health care for pretrial detainees is one that belongs to the custodial agency or to custodial officers and is not owed by a police officer who does not have custody. Shepard further argued that although he did not inform the County jail authorities that Cavalieri's mother said he was suicidal and that his kidnapping victim said that he had threatened to kill himself, his actions were not deliberately indifferent to a substantial risk of suicide as a matter of law. Shepard did take some action. He called Cavalieri at the jail to check on him; he told him his mother would soon be there to see him, after she arranged for a counselor to talk to him; and, he then led Mrs. Cavalieri to the County Mental Health offices.

The Seventh Circuit Court of Appeals disagreed with Shepard and affirmed the trial court. But in so doing it did not cite a single case holding that a police officer owes a duty to a pretrial detainee who is not in his custody. Indeed, defendant has not found any case that has imposed upon a non-custodial police officer a duty to provide medical or mental health or warnings to the custodial agency that such care might be needed. The plaintiff has not cited such a case and the trial court did not find such a case. Yet, the defense of qualified immunity was rejected.

The Seventh Circuit avoided the issue of the duty of a non-custodial officer by simply holding that the right of Steven Cavalieri "to be free of deliberate indifference to suicide" was clearly established. The court downplays the fact that Shepard did not have custody by stating, "The fact that several state agencies were working together on his case, and that Steven happened to attempt suicide in the county's facility rather than at the police station, does not change this analysis." But every case that has imposed a constitutional duty to a pretrial detainee has imposed it upon a custodial officer.

Summary of relevant facts.

The following facts, before the trial court on summary judgment, are limited here to the information that Shepard learned as he became involved in the case.

Officer Donald Shepard, a detective in the City of Champaign Police Department, reported for his normal shift at approximately 8:00 a.m. on June 4, 1998. He was assigned to interview Steven Cavalieri, who had been arrested shortly before at an apartment where he had held his ex-girlfriend

hostage. That situation had been successfully resolved, without injury, by the Champaign Police Department's SWAT team after a standoff of several hours. Shepard was told to interview Cavalieri because Cavalieri might know something about a weapon that had not been found at the scene. Shepard interviewed Cavalieri, beginning at about 8:45 a.m. Cavalieri denied knowing anything about a gun and denied having done anything wrong. Shepard learned very little about why Cavalieri had been arrested. Cavalieri seemed guarded in his answers to the questions Shepard asked him, but otherwise Shepard said he was calm and cooperative. However, he did tell Shepard that he had been arrested on a prior occasion and that when he was in jail he had been able to "talk to someone" and he asked Shepard if he would be able to do that this time. Shepard understood Cavalieri to be asking whether he could see a counselor at the County jail. Shepard told him that he should tell the jail personnel at intake that he wanted to see a counselor. The interview ended shortly before 10:00 a.m. and Cavalieri was then transported to the County jail where custody was transferred to the County Sheriff.

Shepard was assigned as part of the investigation team and following the end of his interview with Cavalieri, he joined an interview in progress, at a few minutes after 10:00 a.m., with Cavalieri's hostage, Stephanie Rouse. Rouse was telling Detective Strezesak about the events of the night before when Shepard joined the interview. She told the officers that about a month earlier Cavalieri, her ex-boyfriend, had broken into her apartment. He was arrested and he was ordered to stay away from her. Nonetheless, he had driven down from Chicago to see her and she agreed to talk to him. In the early morning hours of June 4, 1998, he drove her out into a rural area and then threatened to kill her and himself. He showed her a pistol and a knife. She was frightened but

was able to calm him down. They drove back to Champaign and went to a restaurant. There, Cavalieri told her he got rid of the gun and apologized to her. They called Cavalieri's mother, who lived in the Chicago area, from a pay phone at the restaurant. Mrs. Cavalieri called the Crisis Hotline in Champaign County. Cavalieri and Rouse left the restaurant and went to a friend's apartment where they also placed a call to the Crisis Hotline. She described the contact with the SWAT team and leaving the apartment.

Cavalieri's mother drove down from Chicago arrived at the Champaign Police Department between 10:45 and 11:00 a.m. Detective Shepard and some other officers interviewed her. Mrs. Cavalieri told Shepard she wanted to make arrangements to get a counselor to see her son because he had seen a counselor the previous time he was arrested. She testified that she told Shepard about her son's mental condition, the calls to the Crisis Line, that he had been on suicide watch when he was arrested in May, and that he needed to be on suicide watch and not be alone. According to her, Shepard promised that Cavalieri would not be alone; she said that Shepard told her that her son was "on overload."

While Mrs. Cavalieri was still with him, Shepard called the jail and talked to Cavalieri. Shepard testified that he told Cavalieri that his mother was in Champaign and would come to see him after she made arrangements to have a counselor see him. Cavalieri said he was okay and was looking forward to seeing his mother. At approximately 11:30 a.m., Mrs. Cavalieri followed Shepard to the Champaign County Mental Health Center so that she could talk to counselors about her son.

At approximately 2:10 p.m., Cavalieri was found in the holding cell, unconscious, hanging from the telephone cord. He has not regained consciousness since that time and he remains essentially in an unresponsive state and resides in a nursing home near his mother's residence.

Plaintiff did not offer any expert testimony of Cavalieri's mental state at any time. There is no expert testimony that Cavalieri exhibited symptoms of suicidal tendency or that he was in fact suicidal at any time before he was found hanging in the jail cell. There is no expert testimony to explain the significance of the threats he made to his ex-girlfriend. There was no evidence offered to support Mrs. Cavalieri's claim that her son was suicidal. There is no expert testimony that a lay person would have recognized that Cavalieri was suicidal or that even a mental health professional would have recognized this.

In his deposition, Shepard testified that following his interview of Cavalieri and Rouse and after speaking to Cavalieri's mother, he did not believe Cavalieri was a suicide risk. Shepard said his belief was based upon the following facts and observations: although Rouse had said that Cavalieri had threatened to kill her and himself, she also said he later told her he would not hurt her and apologized to her; Cavalieri was calm when Shepard interviewed him, Cavalieri was already under arrest and had no weapon; he was in custody and in a safe place; and, when Shepard talked to him on the telephone at the jail, he said he was fine and indicated he wanted to see his mother.

REASONS FOR GRANTING THE PETITION

The Court should grant this Petition because the appellate court improperly applied this Court's decisions in *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666 (2002) and *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) greatly diminishing the protections of qualified immunity. In holding that Shepard had a constitutional duty to warn a the jail of the facts he learned after custody had been transferred, the Court announced such a duty for the first time but still denied Shepard the protections of qualified immunity. It is Petitioner's position that on both prongs of the test of qualified immunity (no such duty was owed and no such duty was clearly established in the law when Shepard acted) the appellate court erred.

The opinion of the Seventh Circuit creates a new class of duties which law enforcement officers now owe to persons held in custody by another agency. Under the rule now in place in the Seventh Circuit, a law enforcement officer has a continuing duty to keep jail officials apprised of information developed during the course of a criminal investigation if that information suggests that a detainee might be suicidal. The Seventh Circuit does not limit that duty to officers involved in the case; rather, any state actor who has information that might bear upon the mental health of one in custody would have to be reported. The court did not describe the kinds of information that must be reported to the jail authorities, the length of time the duty might last, to whom the report must be made, or whether the reporting officer must somehow follow up his report. The opinion does not indicate what, if anything, the jail authorities must do with the information. Further, although prior case law suggests

that even custodial officers must act only upon information indicating a substantial and imminent risk of suicide, this decision suggests a dramatic expansion of the duty because, here, there was no evidence that the risk was substantial or imminent.

The Seventh Circuit was wrong. It has greatly diminished the protections of qualified immunity. Even while citing and ostensibly following this Court's decisions in *Saucier* and *Hope*, it has created a new constitutional duty, it has departed from well-settled law, it has created an unjustified burden on law enforcement and it has significantly diminished the proof required to show deliberate indifference.

I. A non-custodial officer does not owe an on-going constitutional duty to a pre-trial detainee to keep the jail authorities informed of information the officer learns, after custody has been transferred, about the detainees' mental condition.

When one is involuntarily confined in a jail he is unable to provide for himself the basic necessities of life. This Court has determined that the prisoner has certain constitutional rights to basic necessities. Those who confine him, if he is convicted and serving a sentence, owe the prisoner correlative constitutional duties under the Eighth Amendment to provide him with, for instance, necessary medical care. (*E.g. Estelle v. Gamble*, 429 U.S. 97, 103, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976); *see also Farmer v. Brennan*, 511 U.S. 825, 833, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994).) A similar analysis has been applied to the pre-trial detainee, although the Fourteenth Amendment rather than the Eighth Amendment has been found to be the source of the right. *Bell v. Wolfish*, 441 U.S. 520, 535 n.16, 60 L. Ed. 2d 447, 99 S. Ct. 1861

(1979); *Payne v. Churchich*, 161 F.3d 1030, 1039-41 (7th Cir. 1998); *Tesch v. County of Green Lake*, 157 F.3d 465, 473 (7th Cir. 1998).

In all of these cases, the right of the person in custody is held against the custodial officers or agency. In no case that petitioner has found, in no case cited by the plaintiff here, and in no case cited by the district court or the appellate court below, has a person in custody been found to hold such a right against an officer who does not have custody of him. Indeed, both This Court and the Seventh Circuit have noted it is because of the custody that a right is held and a duty is owed but where there is no custody there can be no due process violation. (*Estelle v. Gamble*, 429 U.S. 97, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976); *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 198-201, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989) and *Collignon v. Milwaukee County*, 163 F.3d 982, 987 (7th Cir. 1998) (rejecting claimed due process rights and duties to protect those who are not in custody).) Those who have custody have the ability to observe the person detained and to act upon his needs. In this situation, Shepard could not provide mental health treatment. He could not take Cavalieri to a doctor. The Sheriff has sole and exclusive authority over the inmates of the County jail. *Moy v. County of Cook*, 159 Ill. 2d 519, 640 N.E.2d 926 (1994).

The Seventh Circuit found that Cavalieri had a constitutional right to be "free from deliberate indifference to suicide." (321 F.3d at 623) While as a general proposition that constitutional right may exist, in this case that is not enough to resolve the first prong of the qualified immunity analysis. The question is, upon whom does the correlative duty to protect that right fall? Unlike most cases where the

identification of the constitutional right also identifies who owes the correlative constitutional duty, it is not as clear in this case. In this case, the plaintiff and the Seventh Circuit seek to place the duty upon one who does not have custody and one who does not have authority to act to relieve the risk.

All of the cases place the duty upon the custodians. None have placed a duty upon non-custodians until the Seventh Circuit did here when it announced the duty to warn. There does not appear to be any basis for finding such a duty in the due process clause of the Fourteenth Amendment.

II. The right of the pre-trial detainee to the warning required by the Seventh Circuit and the duty of the officer to give such a warning were not clearly established in the law.

Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), and *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666 (2002), both noted that qualified immunity "operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'" (*Hope*, 536 U.S. at 739 quoting *Saucier*, 533 U.S. at 206.) While there need not be a case which has specifically held that the very act in question is unlawful, still the law must be clear enough that an officer has the same fair notice that a criminal defendant has the his actions are unlawful. (*Hope*, 536 U.S. at 740, 121 S. Ct. at 2515, 153 L. Ed. 2d at 678.) In *Saucier*, the Court cautioned that the inquiry into whether the constitutional right was clearly established must be undertaken in light of the specific circumstances facing the officer, and not as a general proposition, so that he would have notice that his conduct was unlawful under those circumstances. *Saucier*, 533 U.S. at 202, 121 S. Ct at 2156, 150 L. Ed. 2d at 82.

Despite that admonition, however, the appellate court below described the right claimed by plaintiff in very broad terms: ". . . the right Mrs. Cavalieri asserts on behalf of Steven is the right to be free from deliberate indifference to suicide. There is no doubt that this right was clearly established prior to Steven's 1998 suicide attempt. *See Hall v. Ryan*, 957 F.2d 402, 406 (7th Cir. 1992)." (321 F.3d at 623) *Citing Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666 (2002), the court found the law which existed at the time gave Shepard fair notice that his failure to notify the County jail that he had learned facts suggesting that Cavalieri was a suicide risk was unlawful and unconstitutional. 321 F.3d at 623-24.

The appellate court cited no prior cases which held that an officer owes a duty to a prisoner or a detainee who is not in his custody to keep the custodial agency advised of information the officer learned about the prisoner after custody was transferred. Of the three cases it discussed in the context of the argument, *Egebergh v. Nicholson*, 272 F.3d 925, 927-28 (7th Cir. 2001), *Collignon v. Milwaukee County*, 163 F.3d 982 (7th Cir. 1998) and *Viero v. Bufano*, 901 F. Supp. 1387, 1394 (N.D. Ill. 1995), none so held. In *Egebergh*, custodial police officers failed to allow the prisoner his shot of insulin, knowing he needed it. His death was attributable to their failure, while he was in their custody, to provide him with the insulin. (272 F.3d at 927-28.) In *Collignon*, plaintiffs claimed that the previous custodial officers violated their son's substantive due process rights by releasing him on bond with knowledge of his mental problems. The Seventh Circuit rejected the argument that the defendants had a duty to protect after the release on bond stating, ". . . whatever liability might attach to the County defendants must be based on actions or inactions taken while Jonathan was in custody" and specifically noted that the constitutional duty to provide health care flows

directly from the fact of custody. (*Collignon*, 163 F.3d at 987.) Finally, in *Viero*,[1] a trial court, addressing the defense of qualified immunity on a motion to dismiss, held that a juvenile's probation officer had a duty to provide to the detention center information concerning medication he was on and some of his history, information the probation officer had prior to his incarceration. In that case it was also alleged that the probation officer had refused to deliver the juvenile's medication to the jail authorities. *Viero,* 901 F. Supp. at 1394-95.

In this case, however, the Seventh Circuit Court of Appeals has framed the constitutional right in the most general of terms and applied *Hope* and *Saucier* in such a manner that Shepard had no notice at all that he had a constitutional duty to Cavalieri[2] to keep the County jail advised of information developed during the investigation of the crimes for which Cavalieri was arrested

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1. Not only is this case not on point, but because it is a district court opinion it is not controlling authority for the purpose of finding clearly established law. *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995).

2. In a hypothetical discussion, the appellate court suggests that if Shepard had information that Cavalieri was violent or was armed, Shepard may have had a duty to other prisoners or other correctional officers to warn them of those facts. (321 F.3d at 623.) Whether such a common law duty to others would lie in a tort case does not seem relevant to the existence of a constitutional duty owed to Cavalieri. The court also refers to the correctional officers at the jail as "colleagues" of Shepard, although they do not work for the same agency. This reference suggests that the court views the difference in agencies as insignificant and implies that all law enforcement officers regardless of the agency they work for have a duty to share information regarding physical or mental health of prisoners. The court cites no cases, however, that require the sharing of information between agencies.

and that he was acting unlawfully in failing to inform the jail authorities. The only cases cited by the court impose a duty only upon custodial officers. Had Shepard read all of the cited cases, he would not have discovered that he had a duty to warn.

A custodial officer has a duty to act in a way that is not deliberately indifferent to the risk perceived. (*See Farmer v. Brennan*, 511 U.S. 825, 837, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994).) Where the risk at issue is one of suicide, the duty to protect or to provide medical or mental health services is imposed where the need is substantial and the risk is imminent. (*Estate of Novack v. County of Wood*, 226 F.3d 525, 529 (7th Cir. 2000) ("In order to be liable under the Eighth Amendment, a prison official must be cognizant of the significant likelihood that an inmate may imminently seek to take his own life and must fail to take reasonable steps to prevent the inmate from performing this act."); *Collignon*, 163 F.3d at 990 ("Placing a pre-trial detainee on some level of suicide watch, even the highest level, does not demonstrate a subjective awareness of a substantial risk of imminent suicide.").) The risk, in the absence of a doctor's diagnosis, must be objectively serious. An objectively serious risk is one "so obvious that even a lay person would easily recognize the necessity for a doctor's attention." (*See Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997), quoting with approval, *Laaman v. Helgemoe*, 437 F. Supp. 269, 311 (D.N.H. 1977).) It is a difficult burden to show what a layman should recognize. As quoted above, the Seventh Circuit recently held, in a case where the inmate had been treated a psychiatrist, even knowledge of mental problems and that a detainee was on a high level of suicide watch was held not to be sufficient to show this immanency of risk. *Collignon*, 163 F.3d at 990.

There was no expert testimony offered by the plaintiff here; there was no mental health assessment or diagnosis. Only an unsupported statement of Mrs. Cavalieri, who had not yet seen her son and who had only information by telephone in the early morning hours during the kidnapping, and the allegation of Rouse that Cavalieri had threatened to take his own life after killing her, a threat he did not carry out, were available to Shepard to support an inference that suicide was even a remote possibility. But Shepard had no evidence from which knowledge of an *imminent* or even a substantial risk of suicide could be inferred. At the time Cavalieri threatened to kill himself, he was also threatening to kill his hostage. That situation was resolved. Cavalieri had not carried out his threat when he did have weapons. Now, Cavalieri was unarmed and in the custody of the jail. No mental health expert, no doctor, had made any diagnosis or even suggestion that Cavalieri was suicidal. The statements of Mrs. Cavalieri contradicted Shepard's own observations and his knowledge from Cavalieri himself during the interview and the telephone conversation. There was no evidence obvious to a layman that the risk of suicide was significant, likely or imminent.

Finally, it is important to understand just how low a bar the Seventh Circuit has set for proof of deliberate indifference. As the dissenting opinion below pointed out, if Shepard had any duty to Cavalieri it was a duty to act in a way that was not deliberately indifferent. Shepard did not ignore the mental stress that Cavalieri was under. Shepard did take action on the risk he perceived. In his initial interview, Shepard told Cavalieri that he could see a mental health counselor at the jail by asking the intake officer. He advised Mrs. Cavalieri to go to County Mental Health to make arrangements for a counselor. He called Cavalieri at the jail, checked his welfare and told him his mother would be seeing him after she talked to county mental health. Nonetheless, the

Seventh Circuit has suggested that the jury might find that his failure to make the telephone call to the jail, warning them of this information, was deliberate indifference.

These actions do not meet the standard of deliberate indifference, actions akin to intentional conduct, to criminal recklessness, ignoring a known risk, set out in *Farmer v. Brennan*, 511 U.S. 825, 837, 128 L. Ed. 2d 811, 114 S. Ct. 1970 (1994). (*See also Hudson v. McHugh*, 148 F.3d 859, 863 (7th Cir. 1998) (deliberate indifference is equated to "inaction or woefully inadequate action.")) If Shepard should also have called the jail to tell them of mother's concern and the statements of the hostage, it can be no more than negligence. A jury should not be allowed to decide, as did the panel, that because a telephone call was easy to make Shepard's failure to make it was deliberately indifferent.

For each of these reasons – that no court had held a non-custodial officer owed a duty to warn; that there was no evidence that the risk of suicide was substantial and imminent; and that the existing law indicated that only no action or woefully inadequate action could constitute deliberate indifference – the appellate court erred in finding that Shepard's duty was clearly established and that he should have known that his failure to call the jail was unlawful.

This Court should grant the writ of certiorari to correct the fundamental errors of the appellate court in applying the decisions in *Saucier* and *Hope* to the qualified immunity defense raised in this case and to review the holding that non-custodial police officers owe a Fourteenth Amendment duty to persons not in their custody.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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